Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

82-313

NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., CARMEN E. PAVONE, JR., and PAVONE, INC.
Petitioners,

VS.

Louis O. Giuffrida,
~~JOHN W. MACY,~~ DIRECTOR
FEDERAL EMERGENCY MANAGEMENT AGENCY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John F. Bashar
Law Office of John G. Betar, Jr.
P.O. Box 838
10 Middle Street
Bridgeport, Connecticut 06601
(203) 335-2222
Counsel for Petitioners

August 20, 1982

QUESTION PRESENTED

Whether the Federal Emergency Management Agency (FEMA) should be equitably estopped from denying payment to an insured under a flood insurance contract when a partial payment has already been made by FEMA under the same contract based upon a proof of loss which was not submitted in compliance with the terms of that contract, and both parties continued thereafter to negotiate the loss.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7

INDEX TO APPENDIXES

	Page
Appendix A Opinion of the United States Court of Appeals, Second Circuit App. p. 1	1a
Appendix B Judgment of United States District Court, District of Connecticut	3a
Appendix C Ruling on Defendant's Objection to Decision of United States Magistrate by Burns, J., District Court Judge	4a
Appendix D Decision of United States Magistrate	8a
Appendix E Decision of U.S. Court of Appeals (Seventh Circuit) *Meister Bros. Inc.* v. *John W. Macy, Jr.*, Director of FEMA decided March 29, 1982	10a

TABLE OF AUTHORITIES

Cases	Page
Ann Hansen v. *Patricia Roberts Harris,* Sec. of H.E.W. 619F2942 (2nd Circuit 1980)	6
Brandt v. *Hickel* 427F253 (9th Circuit, 1970)	6
Corniel-Rodriguez v. *INS 532F2301 (2nd Circuit, 1976)*	6
Federal Crop Ins. Corp. v. *Merrill* 332 U.S. 380 (1947)	6
Meister Brothers Inc. v. *John W. Macy, Jr.,* Director of FEMA No. 81-1795 (Seventh Circuit, Ct. App. 1982) (See Appendix E - App. p. 10a)	5
Schweiker, Sec. of Health and Human Services v. *Hansen* 450 U.S. 785 (1981)	6
United States v. *Fox Lake State Bank* 366F2962 (7th Circuit, 1966)	6
United States v. *Lazy F. C. Ranch* 481F2985 (9th Circuit, 1973)	6

NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., CARMEN E. PAVONE, JR., and PAVONE, INC.
Petitioners,

VS.

JOHN W. MACY, DIRECTOR
FEDERAL EMERGENCY MANAGEMENT AGENCY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Carmen E. Pavone, Sr., Carmen E. Pavone, Jr., and Pavone, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 24, 1982.

Opinions Below

The opinion of the Court of the Appeals for the Second Circuit is unreported. The decision of that Court is printed as Appendix A hereto.

The opinion of the United States District Court for the District of Connecticut is unreported. The Memorandum of Decision of that Court is printed as Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 24, 1982 and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of the United States Supreme Court is being invoked under 28 U.S.C. §1254(1).

STATEMENT OF CASE

The Petitioners, Carmen E. Pavone, Sr. and Carmen E. Pavone, Jr. are the owners of certain property located at 2428 Main Street, Stratford, Connecticut. They are also the sole stockholders of a Connecticut corporation known as Pavone, Inc., which operates a restaurant business at that premises.

In December, 1978, the Petitioner, Pavone, Inc. purchased and thereafter maintained in full force a flood insurance policy on the premises. The policy was issued by the predecessor of the Federal Emergency Management Agency (FEMA) under the National Flood Insurance Program (NFIP). The policy provided coverage for all direct loss by flood, including structural damage and content loss.

On January 21, 1979 the property of the Petitioners both real and personal was damaged by severe flooding conditions. On the same day Carmen E. Pavone, Jr. notified his insurance agent of the damage and a notice of loss was filed soon thereafter.

On January 23, 1979, an adjuster from General Adjustment Bureau (GAB) inspected the premises relative to the loss. GAB had been requested and assigned by FEMA to inspect and adjust the flood insurance claim of Pavone, Inc.

During the months of February and March, 1979, the Pavones obtained structural engineering reports to substantiate the structural damage to the building. These were submitted to the adjuster for FEMA within 60 days after the date of loss. Since there was no cellar other than a crawl space under the floor, it was somewhat difficult for anyone to visually inspect the damage to the foundation.

Several on-site meetings were held during the months of February and March, 1979, at the request of FEMA's adjuster so that he could investigate and inspect the loss. In fact, FEMA obtained its own independent structural engineering report to determine the damage to the building. The Petitioners also submitted to FEMA's adjuster a list of all personal property and contents which were damaged by the flood.

On March 14, 1979, within 60 days after the date of loss an on-site meeting was held between the Pavones, Richard Kelly of GAB, adjuster for FEMA, and the structural engineers (one having been hired by FEMA). Also present at the meeting was Attorney John G. Betar, Jr., representing the Pavones. All parties agreed at that meeting that further cost estimates would be required relative to the structural damage and that therefore the contents loss and the structural loss would be adjusted separately. (The flood policy provided for content coverage in the amount of $20,000 and structural damage coverage in the amount of $80,000). It was further agreed at this meeting that the Pavones were to submit additional contractor's estimates for the repair of the building structure.

After that meeting an agreed upon figure was reached relative to the contents loss. FEMA prepared and sent a document entitled "Proof of Loss" marked "Contents Only" for Plaintiffs' signature. This partial proof of loss covering the contents

damage was sent by FEMA's adjuster on April 4, 1979, executed by the Pavones and returned on April 5, 1979 to FEMA. On April 19, 1979 FEMA issued a check under the flood policy to pay for the contents portion of the loss based upon this Proof of Loss which was submitted some 74 days after the date of loss.

In accordance with the agreement reached at the meeting of March 14, 1979, the Pavones thereafter obtained additional contractor estimates and submitted them to the adjuster for FEMA. After review of these estimates the adjuster requested additional on-site inspections which were held in July, 1979. Negotiations and inspections were on-going between the parties from the date of loss through July, 1979. Thereafter FEMA's adjuster issued a letter dated July 23, 1979 to the Pavones' attorney stating "We are willing to accept a Proof of Loss in the net amount of $11,300.15...." for the structural damage to the building.

The offer was not acceptable to the Pavones since all the estimates which they had obtained were much higher. Since the parties were unable to negotiate a settlement for the loss the Pavones instituted an action against FEMA.

It should be noted that the crux of the dispute between the parties had nothing to do with the filing of Proof of Loss forms but rather the fact that FEMA's determination that the amount of the loss was not the result of the flood but the result of the previous deteriorated condition of the building structure.

In FEMA's answer and special defense it raises for the first time a question as to the Pavones' compliance with the contract language requiring that they file a Proof of Loss within 60 days after the date of loss. FEMA then filed a Motion for Summary Judgment alleging several defects and violations by the Pavones under the terms of the contract. On September 3, 1981, U.S. Magistrate Thomas P. Smith denied FEMA's motion for Summary Judgment and FEMA then filed an objection to that decision and reiterated its claim that Pavones' failure to file a "proof of loss" was a bar to this action.

On January 7, 1982, Ellen Bree Burns, United States District Judge granted the FEMA's Motion for Summary Judgment, and the Court of Appeals for the Second Circuit affirmed that decision on May 24, 1982.

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over the pending action by virtue of 42 U.S.C. §4072.

REASONS FOR GRANTING THIS WRIT

Certiorari should be granted in this case because the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal on the same issue.

The Seventh Circuit has ruled, in a case which is factually identical with the Petitioners', that a government agency will not be permitted belatedly to assert a technical defense to a law suit, and that under limited factual circumstances the Government may be equitably estopped.

In *Meister Bros. Inc.* v. *John W. Macy, Jr.* Director of Federal Emergency Management Agency, No. 81-1795 (7th Cir., C.D. Ill., March 29, 1982) the General Adjustment Bureau was again hired by FEMA to investigate and adjust a flood loss. GAB made several on-site inspections investigating the loss and after the deadline for filing the proof of loss form had passed, the adjuster prepared for the insured's signature a proof of loss for the contents portion of the loss. FEMA paid on the loss for the contents and GAB continued to investigate and negotiate the damage to the building, however no settlement was reached and suit was instituted.

The Court in the Seventh Circuit held that "Given these facts, we find that the conduct of the Agency and its agents were sufficient to estop the government from asserting the untimely filing as a defense in any manner." IBID

The question of estoppel against the government has been deemed appropriate in several Circuits under certain circumstances. *United States* v. *Fox Lake State Bank* 366 F2962 (7th Circuit 1966); *United States* v. *Lazy F.C. Ranch,* 481 F2d985 (9th Circuit, 1973): *Brandt* v. *Hickel* 427 F253 (9th Circuit 1970); *Ann Hansen* v. *Patricia Roberts Harris, Secretary of H.E.W.* 619 F2942 (2nd Circuit, 1980); *Corniel-Rodriguez* v. *INS* 532 F2d301 (2nd Circuit 1976).

However, neither the circuit courts nor the Supreme Court have set forth what type of conduct will estop the Government, except that the principles of estoppel will be applied with circumspection to the conduct of government operations.

In its recent decision *Schweiker, Secretary of Health and Human Services* v. *Hansen* 450 U.S. 785 (1981) the Court recognized that it "has never decided what type of conduct by a Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." Nor has the Court decided what type of conduct would invoke the principles of estoppel when the Government enters into contractual relationships with its citizens.

The Court has relied upon the language in *Federal Crop Insurance Corp.* v. *Merrill* 332 U.S. 380 (1947) at 385 where the Court said "(it is) the duty of all Courts to observe the conditions defined by Congress for the charging the public treasury."

Unlike Merrill the instant case deals with a valid contract between the Government and its citizens which was in full force and effect at the time of the loss. Further, the Government continued to deal with the Petitioners to negotiate their loss, and not until litigation was instituted did it raise the technical defense of an untimely filed proof of loss.

The Court should clarify the factual distinctions which affect the question of when the Government may be estopped. The lower courts are still inconsistent with their rulings even when the exact factual situation exists.

The issue of Governmental estoppel raises important economic questions especially for the Petitioners. Unlike Hansen, the Petitioners are forever barred from recovery of their loss if the lower Court decision is allowed to stand. The Petitioners were entitled to coverage under a valid insurance contract with FEMA and would have recovered under these factual circumstances had the insured been a private insurance carrier.

This is not a situation where the Court must protect the public treasury. The Petitioners sustained a valid loss under a policy issued by the Government, and for which the Petitioners had paid to the Government premiums. After the loss the insured dealt in good faith with the Government in negotiating the loss until an impasse was reached regarding their structural loss. The facts are clear that the Petitioners cooperated and supplied everything requested by the government even after the 60 days expired.

The Government is not acting in its sovereign capacity when dealing with its private citizens in issuing flood insurance policies. The Government is effectively engaged in private business and should be subject to the rules of equity and fair play.

CONCLUSION

The petition for certiorari should be granted. The Supreme Court should review this case because the Court of Appeals are in conflict on the question of estoppel against the government and under what circumstances the principles of estoppel will be applied. This issue is one of substantial public importance under federal case law and the time is ripe for the Supreme Court to settle this question.

RESPECTFULLY SUBMITTED

JOHN P. BASHAR
Law Offices of John G. Betar, Jr.
P.O. Box 838
10 Middle Street
Bridgeport, Connecticut 06604
Tel: 203-335-2222

NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., CARMEN E. PAVONE, JR., and PAVONE, INC.
Petitioners,

VS.

JOHN W. MACY, DIRECTOR
FEDERAL EMERGENCY MANAGEMENT AGENCY
Respondent.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May, One Thousand Nine Hundred and Eighty-Two.

PRESENT:

HON. WILLIAM H. TIMBERS, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. AMALYA L. KEARSE, Circuit Judge

---x

PAVONE, INC., CARMEN E. PAVONE, SR. and CARMEN E. PAVONE, JR.,

Appellants,

v.

JOHN W. MACY, JR., DIRECTOR FEDERAL EMERGENCY MANAGEMENT AGENCY,

Appellee.

---x

ORDER
82-6031

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Pavone, Inc., Carmen E. Pavone, Sr. and Carmen E. Pavone, Jr. appeal from an order of the United States District Court for the District of Connecticut (Burns, J.) granting appellee's motion for summary judgment. Appellants' action sought recovery under a flood insurance policy administered by the Federal Emergency Management Agency.

After due consideration, it is ordered, adjudged and decreed that the judgment of the District Court be and it hereby is affirmed substantially for the reasons set forth in the opinion and order of the Hon. Ellen Bree Burns, District Judge. In reaching this conclusion, we are mindful of the fact that appellants were represented by counsel at all times during the negotiation of their claims.

/s/Hon. William H. Timbers
Hon. William H. Timbers

/s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/Hon. Amalya L. Kearse
Hon. Amalya L. Kearse

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAVONE, INC., CARMEN E. PAVONE, SR., and CARMEN E. PAVONE, JR.	)	
v.	)	Civil B-80-29
SECRETARY OF HOUSING AND URBAN DEVELOPMENT	)	

JUDGMENT

This cause came on for consideration of the defendant's Objection to Decision of United States Magistrate by the Honorable Ellen Bree Burns, United States District Judge, and

The Court having considered the defendant's objection and all the papers submitted in connection therewith filed its Ruling on Defendant's Objection to Decision of United States Magistrate sustaining the objection,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendant.

Dated at Bridgeport, Connecticut, this 13th day of January, 1982.

SYLVESTER A. MARKOWSKI, Clerk

By /s/Kevin F. Rowe
Kevin F. Rowe
Deputy-in-Charge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAVONE, INC., CARMEN E. PAVONE, SR., and CARMEN E. PAVONE, JR. :

v. : CIVIL NO. B-80-29

SECRETARY OF HOUSING AND URBAN DEVELOPMENT :

RULING ON DEFENDANT'S OBJECTION TO DECISION OF UNITED STATES MAGISTRATE

On September 3, 1981, the United States Magistrate denied defendant's motion for summary judgment made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. Defendant, Director of the Federal Emergency Management Agency (FEMA), administers the National Flood Insurance Program[1] under which plaintiff Pavone, Inc., lessee of the individual plaintiffs, was issued a Standard Flood Insurance Policy (SFIP) on December 6, 1978. The SFIP provided $80,000 coverage on plaintiffs' building, located at 2428 Main Street, Stratford, Connecticut, and $20,000 coverage on the contents of the building. Plaintiffs allege that the insured property sustained compensable flood damage on January 21, 1979. Defendant, on the other hand, argues that plaintiffs are barred from recovering for failing to comply with a condition precedent in the SFIP.

---

[1]The NFIP was established in 1968 by the National Flood Insurance Act, 42 U.S.C. §§ 4001 *et seq.* From June 6, 1969, until December 31, 1977, the program was managed by the National Flood Insurers Association, which issued policies, processed claims, and defended legal actions. On January 1, 1978, the Department of Housing and Urban Development took over responsibility for the program pursuant to 42 U.S.C. § 4071. On April 1, 1979, responsibility for management of the program was transferred to FEMA.

After reviewing the undisputed facts, the relevant law, and the decision of the magistrate, the Court concludes that summary judgment must be granted for defendant. *See Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975) (standard for granting summary judgment).

The SFIP issued to plaintiff corporation plainly requires the insured to submit a "proof of loss" to the insurer within 60 days of the date of the alleged loss. Paragraph O of the General Conditions and Provisions to the SFIP provides:

> The insured shall give written notice, as soon as practicable, to the insurer of any loss, protect the property from further damage, forthwith separate the damaged and undamaged property and put it in the best possible order. Within 60 days after the loss, unless such time is extended in writing by the Insurer, the Insured shall render to the Insurer a proof of loss, signed and sworn to by the insured....

Noncompliance with these requirements bars an insured from recovering for Paragraph T of the General Conditions and Provisions to the SFIP declares "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy have been complied with...." Interpretation of these contract provisions is a matter of federal law, *see United States* v. *Kimball Foods, Inc.*, 440 U.S. 715, 726 (1979); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383 (1947); *United States* v. *Allegheny Insurance Co.*, 516 F. Supp. 11, 12 (E.D. La. 1981), and "courts have almost invariably denied recovery where the claimant failed to comply with proof of loss requirements for insurance policies issued under federal programs." *Cross Queen, Inc.* v. *Director*, No. 144/1979 at 5 (D.V.I. September 25, 1980); *accord, Harper* v. *National Flood Insurers Association*, 516 F. Supp. 725 (M.D. Pa. 1981); *Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981).

In the instant case there exists no genuine dispute as to whether plaintiffs submitted a "proof of loss" within the required 60-day period. Although plaintiffs submitted a "notice of loss" on January 22, 1979, mere notice does not satisfy the requirements of the contract. Plaintiffs implicitly admit as much by arguing that the purpose of the proof of loss was served by the notice of loss. Moreover, Attachment 1 to plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment is a proof of loss dated April 5, 1979, beyond the permissible 60-day limit. In sum, there is no genuine issue of fact as to plaintiffs' failure properly to submit a proof of loss to defendant.

Conceding the weakness of its argument that notice of loss is the functional and therefore contractual equivalent of proof of loss, plaintiffs, as a fall back position, argue that defendant waived performance of the condition precedent of timely submission of the proof of loss. Despite the fact that defendant's agent inspected the insured property, accepted documentation from plaintiffs,[2] and even made an offer to settle the claim for damage to the building,[3] as a matter of law plaintiffs' claim of constructive waiver must fail because the unambiguous terms of the contract and controlling federal law explicitly preclude oral waiver or waiver by conduct. Paragraph D of the General Conditions and Provisions to the SFIP states

> The extent of the application of insurance under this policy and of the contribution to be made by the Insurer in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

---

[2]Memorandum in Opposition to Defendant's Motion for Summary Judgment, Ex. 8.

[3]*Id.*, Ex. 9.

> No permission affecting the insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of the Insurer relating to appraisal or to any examination provided for herein.

This restrictive contract language comports with NFIP administrative regulations which provide

> The [SFIP] and required endorsements must be used in the Flood Insurance Program and no provision of the said documents shall be altered, varied, or waived other than through the issuance of an appropriate amendatory endorsement, approved by the Administrator as to form and substance for uniform use.

44 C.F.R. § 61.1(13(d)). Thus, there can be no doubt that waiver of the proof of loss requirement can be executed only by a proper written document, not shown to exist in this case. While inability to recover for their flood damage will likely present a hardship to plaintiffs, *see Federal Crop Insurance Corp.* v. *Merrill, supra* at 383, the Court is of the opinion that plaintiffs' failure to submit a proof of loss, coupled with the absence of an effective waiver by defendant of this condition precedent, constitutes a legal bar to this action. Accordingly, the objection to the decision of the magistrate is sustained and defendant's motion for summary judgment is granted.

SO ORDERED.

/s/Ellen Bree Burns

ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 7th day of January, 1982.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PAVONE, INC., ET AL.,	)
	)
Plaintiff,	)
	)
v.	CIVIL NO. B-80-29
	)
JOHN W. MACY, JR., DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY,	)
	)
Defendant.	)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(b) of the Federal Rules for Civil Procedure, Federal defendant herein moves for summary judgment on the ground that there is no genuine issue in dispute as to any material fact in this case and the Federal

9/3/81. DENIED. Defendant makes four arguments in support of this motion. Three of these arguments focus on plaintiffs' November 2, 1979 demolition of the damaged premises. Specifically, defendant contends that by demolishing the premises the plaintiffs breached their contractual duty: (1) to protect the property from further damage after the flood, (2) to exhibit their property to the insurer, and (3) to eschew all deceit and concealment as required by the principle of *uberrimae fidei.* Each of these arguments is a good one, but each involves disputed issues of fact which simply cannot be decided on a motion for summary judgment. *See, e.g., Heyman* v. *Commerce and Industry Insurance Co.,* 524 F.2d 1317, 1320 (2d Cir. 1975). For example, the trier of fact might well find that during the eleven month period between the flood and the demolition, the defendant not only had a reasonable and adequate opportunity to inspect, but that he did in fact adequately inspect it. Such an inference can be drawn from the fact that defendant made set-

tlement offers prior to the demolition. Arguably, he would not have done so had he not adequately investigated beforehand. Likewise, to the extent defendant asserts that plaintiffs engaged in deceit, concealment or infidelity, he is raising issues which by their very nature are inappropriate for resolution under Rule 56, F.R.Civ.P. *See, e.g., Friedman* v. *Meyers,* 482 F.2d 435, 439 (2d Cir. 1973); *Mazaleski* v. *Truesdell,* 562 F.2d 701, 717 (D.C. Cir. 1977); *Handi Investment Co.* v. *Mobil Oil Corp.,* 550 F.2d 543, 547 (9 Cir. 1977); *Pfizer, Inc.* v. *International Rectifier Corp.,* 538 F.2d 180, 185 (8 Cir. 1976); *Staren* v. *American National Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1261-1262 (7 Cir. 1976). Also see, generally, 6 Pt.2 J. Moore, *Federal Practice* ¶56.17[41.-1].

Defendant's remaining argument (*i.e.,* that plaintiffs failed to comply with a condition precedent by failing to submit a "Proof of Loss" as required by Paragraph O of the policy) is far more troublesome and potentially threatening to plaintiffs' case. Unfortunately, defendant has given this argument no special emphasis and, despite its pivitol criticality, has sandwiched it between his other arguments, which, for reasons noted above, simply cannot be resolved on summary judgment.

Plaintiffs in this case contend that they did provide a "Proof of Loss" of sorts by timely submitting various documents and information to defendant. For now, this creates a factual issue sufficient to withstand summary judgment. However, should defendant cease diffusing his resources and undertake concentrated, focused discover on this narrow issue, upon submission of a properly supported Rule 56 motion, he may well be entitled to summary relief. On this record, however, defendant has not sustained his burden.

/s/Thomas P. Smith

THOMAS P. SMITH, U.S. MAGISTRATE

APPENDIX E

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1795
MEISTER BROS., INC.,
Plaintiff-Appellant,

—v.—

JOHN W. MACY, JR., Director of Federal Emergency Management Agency,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION

No. 80-1144—ROBERT A. MORGAN, Judge

ARGUED JANUARY 4, 1982—DECIDED MARCH 29, 1982

Before PELL and SPRECHER, *Circuit Judges,* and MARXEY, *Chief Judge.**

PELL, *Circuit Judge.* The appellant filed this suit in the district court to recover $76,404.61 in building damage and clean-

---

*Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

up costs for debris removal allegedly incurred by it and covered under a flood insurance policy issued pursuant to the National Food Insurance Act, 42 U.S.C. § 4001 *et seq.* (1976). The appellee, the Federal Emergency Management Agency (FEMA or Agency) filed a motion for summary judgment predicated solely on the appellant's failure to file a sworn proof of loss within sixty days from the alleged loss, as required by the insurance contract.[1] Summary judgment was granted. The only issue in this appeal is whether the appellant's failure to file a timely proof of loss is a complete defense available to FEMA.[2]

The facts bearing on liability are not in dispute. On or about July 9, 1978, the appellant's commercial premises were damaged by a flood. The General Adjustment Bureau was delegated by the appellee's predecessor the responsibility of assessing the loss for the NFIP. Dennis Bush, an adjustor with the Bureau, was assigned to the investigation.

Bush first inspected the premises on July 10, 1978, and furnished a report on this first visit to the central office of the National Flood Insurance Program. On July 18, 1978, the

---

[1]The National Flood Insurance Program (NFIP), created pursuant to the National Flood Insurance Act, is a federally subsidized program, which provides flood insurance at or below actuarial rates. From June 6, 1969 to December 31, 1977, the program was administered by the National Flood Insurers Association, an unincorporated association of insurance carriers under a contract with the Department of Housing and Urban Development (HUD). Effective January 1, 1978, HUD took over adminstration of the program. By executive order on April 1, 1979, FEMA assumed responsibility for administering the program. Because of the occasional changes in the identity of the government agency responsible for administering the program, we collectively will refer to whatever agency was currently administering the program as FEMA, Agency or central office of the NFIP.

[2]The appellant conceded in oral argument that federal law governs the issues in this case. *See, e.g., Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981).

appellant submitted a formal Notice of Loss as required by the policy. From July to September, and thereafter until December 22, 1978, Bush made several visits to the site to investigate the loss, to arrange a salvage sale, and to negotiate the amount of the loss to be submitted for reimbursement. Throughout he filed reports of his investigation and negotiations with the NFIP. It is uncontested by the appellee that at no time in this period did Bush ever tender to the appellant a proof of loss form so as to indicate that anything other than the Notice of Loss had to be filed by the appellant within the sixty days. Bush stated it was not his practice to prepare a proof of loss until the parties had reached an agreement on the amount of the loss. Nor is it contested that the Agency had all the information from Bush's reports that it would have had had a proof of loss been filed.[3]

On December 22, 1978, Bush prepared and submitted a proof of loss form executed by the appellant, over three months after the deadline for filing. The form, under a section for stating the "full cost of repair or replacement (building and contents)," had typed in the available space "Partial Payment — Contents $50,000.00." The appellant was subsequently reimbursed $50,000.00 for damage to the contents of the building, and an additional sum of approximately $2,000.00 from the salvage sale. However, Bush continued to investigate and negotiate with the appellant on the settlement offer he had been authorized to make by the central office of the NFIP for the remaining costs of damage to the building and debris removal. None of Bush's reports mention the untimeliness of the proof of loss. No settlement was ever reached on the remaining damages and, as a result, the appellant filed this suit on August 4, 1980.

---

[3]There even appears to be some question whether the proof of loss requirement applies to debris removal. Although the cost of debris removal is clearly covered by the policy, the policy requires that the proof of loss contain only "...the interest of the Insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereof [and] all encumbrances...."

The appellee does not contend that the traditional elements of estoppel are not present in this case, but rather that the conduct of the federal agency and its agent were not sufficient to create an estoppel against the United States Government. This court has recognized that, in certain circumstances, estoppel against the United States may be appropriate. *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966); *accord, United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973). We have also recognized that the applicability of estoppel to the Government should be evaluated in each case with circumspection. *United States* v. *Strauch,* 637 F.2d 477, 482 (7th Cir. 1980); *Gressley* v. *Califano,* 609 F.2d 1265, 1267 (7th Cir. 1979).

Estoppel against the United States was deemed appropriate in *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966). In another case, *United States* v. *Strauch, supra,* this court declined to apply estoppel against the Government, distinguishing *Fox Lake* and the Ninth Circuit's decision in *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973), as situations in which "the Government specifically encouraged a mistake of which it then took advantage." *United States* v. *Strauch,* 637 F.2d 477, 482 (7th Cir. 1980).

The facts of this case are more closely analogous to those in *Fox Lake* than those in *Strauch.* Bush was an investigator for flood insurance claims clothed with authority to investigate, negotiate, and aid in the processing of claims. The Agency had the same information, at the least, from Bush's report as it would have had from a proof of loss filed within the sixty days. Thereafter, Bush investigated and reported the amounts of the loss and actively promoted ongoing negotiations for the amount of the loss to be included in the proof of loss. Settlement offers were made by Bush with authority from the Agency. No proof of loss form was ever tendered to the appellant. However, on December 22, 1978, Bush prepared and submitted a partial proof of loss form over three months late, upon which the appellant, nevertheless, obtained payment. Negotiations on the remaining loss continued thereafter for several months until the parties had reached an impasse. Given these facts, we find that

the conduct of the Agency and its agent were sufficient to estop the Government from asserting the untimely filing as a defense in any manner. Although it is axiomatic that "[m]en must turn square corners when they deal with the Government." *Rock Island, Arkansas & Louisiana Railroad Company* v. *United States,* 254 U.S. 141, 143 (1920), the "public has an interest in seeing its government deal carefully, honestly and fairly with its citizens." *United States* v. *Wharton,* 514 F.2d 406, 412-13 (9th Cir. 1975).

We emphasize that our holding is of necessity limited to the unique circumstances of this case. In light of the Supreme Court's recent opinion in *Schweiker* v. *Hansen,* 450 U.S. 785 (1981) (*per curiam*), it does appear that generally oral misinformation provided by a government employee does not provide a basis for estoppel against the Government. *See, e.g., Cheers* v. *Secretary of HEW,* 610 F.2d 463 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980). Beyond that, however, it is far from clear when the Government may be estopped. *Compare Corniel-Rodriguez* v. *INS,* 532 F.2d 801 (2nd Cir. 1976); *United States* v. *Lazy FC Ranch,* 482 F.2d 985 (9th Cir. 1973); *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966); *Walsonavich* v. *United States,* 335 F.2d 96 (3d Cir. 1964); *Simmons* v. *United States,* 308 F.2d 938 (5th Cir. 1962); *Semaan* v. *Mumford,* 118 U.S. App. D.C. 282, 335 F.2d 704 (1964); *Eichelberger* v. *Commissioner of Internal Revenue,* 88 F.2d 874 (5th Cir. 1937), *cited in Schweiker* v. *Hansen,* 450 U.S. 785, 792 (1981) (Marshall, J., dissenting). Neither of the parties has attempted to address or articulate any general standard and, therefore, resolution of the issue on a broad basis appears inappropriate in this case. Thus, we limit our holding to the facts of this case and do not intend to intimate in any way an appropriate standard for resolution of future cases until the issue is squarely before this court.

We are simply holding on the quite unique facts of this case that a government agency will not be permitted belatedly to assert a technical defense to a law suit which admittedly, if it had been in a state court against a private insurance carrier,

would not have prevailed. The Agency was not in any sense acting in a sovereign capacity here but was engaged in essentially a private business. We are not saying that the Agency's actions were intentionally designed to cause the appellant not to see to it that a formal proof of claim was filed. We do say here, however, that the actions of paying a part of the claim under a policy which the insurer has treated as being fully applicable to the entire claim, over many months of time, does not permit a withdrawl thereafter from the position clearly and unambiguously taken.

Accordingly, the district court's granting of summary judgment for the defendant is reversed. As there are no other issues regarding the defendant's liability under the policy, the case is remanded to the district court for a determination on the issue of damages alone with summary judgment to be entered thereafter in that amount in favor of the plaintiff.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

Office - Supreme Court, U.S.
FILED
OCT 26 1982
ALEXANDER L. STEVAS
CLERK

No. 82-313

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., ET AL., PETITIONERS

v.

LOUIS O. GIUFFRIDA, DIRECTOR,
FEDERAL EMERGENCY MANAGEMENT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Continental Imports, Inc. v. *Macy*, 510 F. Supp. 64 3

Cross Queen, Inc. v. *Director, FEMA*, 516 F. Supp. 806 3

Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 3

Harper v. *National Flood Insurers Association*, 516 F. Supp. 725 3

INS v. *Hibi*, 414 U.S. 5 3

Meister Brothers v. *Macy*, 674 F.2d 1174 ..... 3, 4

Pratte v. *NLRB*, 683 F.2d 1038 4

Schweiker v. *Hansen*, 450 U.S. 785 3

TRW, Inc. v. *FTC*, 647 F.2d 942 4

Regulation:

44 C.F.R. 61.13(d) 1-2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-313

CARMEN E. PAVONE, SR., ET AL., PETITIONERS

v.

LOUIS O. GIUFFRIDA, DIRECTOR,
FEDERAL EMERGENCY MANAGEMENT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend (Pet. 5-7) that the government should be equitably estopped from invoking as a defense their failure to comply with a condition precedent to payment under a flood insurance contract.

1. Petitioner Pavone, Inc., purchased a Standard Flood Insurance Policy (SFIP) on petitioners' building in Stratford, Connecticut. The policy was issued pursuant to the National Flood Insurance Program, which is administered by the Federal Emergency Management Agency (FEMA) (Pet. App. 4a). FEMA regulations provide that the SFIP must be used in the program and that "no provision of the said document shall be altered, varied, or waived other than through the issuance of an appropriate amendatory endorsement, approved by the Administrator as to form and substance for uniform use" (*id.* at 7a; 44 C.F.R.

61.13(d)). In addition, the policy itself provides that no action may be brought thereon for recovery of a claim "unless all the requirements of [the] policy have been complied with," including the submission of a proof of loss within 60 days (Pet. App. 5a). Petitioners allege that the insured property sustained compensable flood damage on January 21, 1979 (*id.* at 4a). It is undisputed, however, that petitioners did not submit a proof of loss within 60 days thereafter (*id.* at 6a).

After a period of adjustment, which included payment for damage to the contents of the building, petitioners brought suit in the United States District Court for the District of Connecticut seeking recovery for alleged damage to the structure of the building. The district court granted the government's motion for summary judgment on the ground that no timely proof of loss had been filed (Pet. App. 4a-7a). The court first rejected petitioners' contention that the "notice of loss" that they had submitted satisfied the contractual requirement of submitting a timely proof of loss, a contention that has been abandoned in this Court (*id.* at 6a). The court also held that actions taken by FEMA during the adjustment period did not waive the proof of loss requirement, explaining that FEMA regulations and the insurance contract preclude all but written waivers (*id.* at 6a-7a).

The court of appeals affirmed in an unpublished opinion for the reasons stated by the district court (Pet. App. 1a-2a). The court specifically noted that it was "mindful of the fact that [petitioners] were represented by counsel at all times during the negotiation of their claims" (*id.* at 2a).

2. Petitioners' contention that FEMA should be estopped from invoking as a defense their failure to comply with the proof of loss requirement is plainly without merit. It is well established that, at least in the absence of affirmative

misconduct (see *INS* v. *Hibi*, 414 U.S. 5, 8 (1973)), the doctrine of equitable estoppel cannot be applied against the government to prevent it from raising as a defense controlling statutes and regulations. See, e.g., *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947). This rule applies even where the plaintiff might otherwise have a valid claim but has failed to comply with procedural requirements in a timely fashion. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Because petitioners allege no affirmative misconduct on the part of the government here, there is no conceivable basis for finding estoppel.

Petitioners urge, however, that review is necessary here to resolve a conflict with *Meister Brothers* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982) (reproduced at Pet. App. 10a-15a). At the outset, we note that no conflict requiring resolution by this Court could conceivably exist because of the explicit lack of precedential value of the decisions involved. The decision below is an unpublished order that, under the rules of the Second Circuit, may not be "reported, cited or otherwise used" in any unrelated case (Pet. App. 1a). *Meister Brothers* was expressly limited to the "unique circumstances of [that] case" and the court explicitly stated that it did not "intend to intimate in any way an appropriate standard for resolution of future cases" (Pet. App. 14a; 674 F.2d at 1177).

In any event, we believe it is clear that *Meister Brothers* was wrongly decided, and there is little reason to expect that it will be followed in the future. Other courts have recognized that the failure to file a timely proof of loss bars a subsequent suit upon an SFIP. See, e.g., *Harper* v. *National Flood Insurers Association*, 516 F. Supp. 725 (M.D. Pa. 1981); *Cross Queen, Inc.* v. *Director, FEMA*, 516 F. Supp. 806 (D. V.I. 1980); *Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981). Moreover, the Seventh Circuit recently set forth some general principles

concerning a claim of estoppel against the government that suggest that estoppel should not have been found in *Meister Brothers*. In *Pratte* v. *NLRB*, 683 F.2d 1038 (1982), the court explained that in order to support an estoppel claim the plaintiff must show affirmative misconduct and meet the following conditions:

> First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury.

Id. at 1041, quoting *TRW, Inc.* v. *FTC*, 647 F.2d 942, 950-951 (9th Cir. 1981). Petitioners' claim does not satisfy this test.

Indeed, because they do not allege detrimental reliance, petitioners' claim is not really one of estoppel. Rather, as the district court correctly perceived (Pet. App. 6a-7a), their contention is actually that FEMA *waived* the proof of loss requirement when it continued to adjust the claim even after the 60-day period had passed. But this contention ignores the fact that both the regulations (44 C.F.R. 61.13(d)) and the contract itself expressly provide that the provisions of the policy can be waived only in writing (Pet. App. 7a). The fact that FEMA continued to discuss settlement of the claim after the 60-day period had run does not constitute an implicit abandonment of a defense based on petitioners' failure to satisfy the proof of loss requirement, which is required by the regulations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

DOJ-1982-10